THE OWNERS OF AND ALL OTHER PERSONS INTERESTED IN CARGO LATELY LADEN ON BOARD THE VESSEL 'GIGEK'

v.

THE OWNERS OF AND ALL OTHER PERSONS INTERESTED IN THE VESSEL 'GIWI' & OTHER VESSELS

HIGH COURT SABAH AND SARAWAK, KUCHING
IAN HC CHIN J
[ADMIRALTY IN REM NO: 27-04-96-1]
21 AUGUST 1999

CIVIL PROCEDURE: *Service - Service of documents a day later than date stated in "unless order"- Whether service irregular - Date stipulated in "unless order" a public holiday - Whether service permitted the following day - Whether service within time under O. 62 r. 8 Rules of the High Court 1980 - Filing of documents with court a day after service - Whether contrary to O. 26 r. 1(6) Rules of the High Court 1980 - Whether filing of documents not a requisite in "unless order"*

Judgment was entered against the defendants for failing to comply with an "unless order". Upon the application by the defendants, the Deputy Registrar set aside the said judgment. Hence the instant appeal by the plaintiffs against the setting aside of the said judgment.

The issues for determination were: (i) whether service of the documents requested in the "unless order" was irregular as the documents were served on the plaintiffs on 21 January 1999, a day later than the date stated in the "unless order"; (ii) whether service was done before 4 pm pursuant to O. 62 r. 8 of the Rules of the High Court 1980 ('RHC'); and (iii) whether the documents must be filed at the same time they were served by virtue of O. 26 r. 1(6) RHC.

Held:

[1] Where the date was concerned, the service of the documents on the plaintiffs on 21 January 1999 was in order, even though it was served one day later than the date mentioned in the "unless order". This was because as January 20 was a public order, service was permitted the following day.

[2] There was a possibility that the defendants' server might be telling the truth and the conflicting time might be due to the respective time-pieces shown. The plaintiffs must establish more than what was shown to conclude on the affidavit evidence that the plaintiffs' version that service

of the documents at 4.04 pm was preferred to that of the defendants' version that service was at 3.57 pm. Thus, the service of the documents at 3.57 pm was accepted.

[3] The "unless order" only adverted to the service of the documents and did not mention the filing of the same. Thus, the "unless order" only prescribed the penalty for the failure to serve and not for any failure to file. The issue here was not the construction of the meaning of the RHC but the construction of the terms of the "unless order" and the "unless order" did not refer to the filing of the documents. In any event, where there was doubt in the construction of the said order, the defendants should be given the benefit of the doubt.

[Appeal dismissed with costs to defendants.]

Legislation referred to:
Rules of the High Court 1980, O. 26 r. 1(6), O. 62 r. 8

For the plaintiffs - Albert Tang; M/s Chew, Jugah, Wan Ullok & Co
For the defendants - Richard Poh; M/s Kho & Poh

Reported by Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

This appeal arose out of the setting aside of a judgment entered on 22 January 1999 against the defendants who are owners of the vessels named Giwi, Giwi II, Gikim, Giswee, Gisoon, Gijoo and Gihuat. Judgment was entered on the ground that the defendants had failed to comply with an "unless order". The defendants applied to set aside the judgment on the ground, *inter alia*, that the said judgment was entered irregularly since there was no default on the part of the defendants in complying with the two orders. The two orders, both dated 13 October 1998 ordered the defendants to within 21 days from the date of the order serve the plaintiffs further and better particulars of certain paragraphs of the defence and answer certain interrogatories to be served on them. By 6 January 1999, the further and better particulars and the interrogatories were not served. However, there was no question of non-compliance of that order concerning the answer of interrogatories since the interrogatories were not served. Be that as it may, the plaintiffs, being the owners of and being persons interested in the cargo, applied for an "unless order" on the ground that the defendants had failed to comply with the two orders. Consequently, the court on 6 January 1999 made, *inter alia*, the following order:

> unless by the 20th day of January, 1999, the Defendants comply with the (2) Orders of the Court, both dated the 13th day of October 1998, in particular, the supply of Further and Better Particulars and the Answers to the Interrogatories, as ordered; the Defence be struck out and the Judgment be entered for the Plaintiff with costs and interests; …

Those documents were served on the plaintiffs' advocates on 21 January 1999 being one day later than the date mentioned in the "unless order" but it is common ground that in so far as the date is concerned it is in order as January 20 happened to be a public holiday and hence service was permitted the following day. However, Mr. Albert Tang, learned counsel for the Plaintiffs, submitted that in order for service to be reckoned as being done on January 21 it must be done before 4.00 p.m. on January 21 as otherwise it will be regarded as having been done the following day. He relied on O. 62 r. 8 of the Rules of the High Court 1980. There is dispute as regards the time of service, with the defendants filing an affidavit to say that the server had arrived at the plaintiffs' advocates office at 3.57 p.m and had served the documents at that time. The plaintiffs on the other hand filed an affidavit to say it was served at 4.04 p.m. which time was denoted on the proof copies together with the words "without prejudice". The plaintiffs argued that it was more likely than not that the time of service was 4.04 p.m. because there was no protest when it was so denoted on the proof copies that were given back to the defendants' server. However, Mr. Tang overlooked one notorious fact which is that no two time pieces will show exactly the same time with the result that different time-pieces may show varying times with a difference of as much as several minutes, depending on how fast or how slow it is running. This may bring about the result that both deponents may be telling the truth according to what their time-piece showed. Since the possibility exists that the defendants' server may be telling the truth and the conflicting time may be due to the respective time-pieces showing different time, I cannot dismiss the defendants' affidavit assertion as being improbable. The plaintiffs have to establish more than what is shown if the court is to conclude on the affidavit evidence that the plaintiffs' version of service being done at 4.04 p.m. is to be preferred to that of the defendants. Therefore, I will accept that the service of the documents was done within time at 3.57 p.m.

Mr. Tang then argued that it was still not within time because the documents though served on January 21 were not filed with the court until the January 22 and that this is against O. 26 r. 1(6) of the Rules of the High Court 1980 requiring the documents to be filed at the same time they are served. The short answer to that contention is that the "unless order" only adverted to the service of the documents and did not mention the filing of the same. Therefore, the "unless order" only prescribed the penalty for the failure to serve and not for any failure to file. Mr. Tang had referred to the rules requiring filing but

the issue here is not the construction of the meaning of the Rules of the High Court but of the terms of "unless order" of the court. To my mind, the two orders are clear and they related specifically to the service of the documents and not to the filing. There is no term therein that the documents must be filed at the same time and therefore the "unless order" was not meant to and did not refer to the filing of the documents. If it was intended to include filing in the "unless order" it could have easily been stated just as was done with service. Its absence shows that the "unless order" was not directed at filing. In any event, where there is doubt in the construction of the order, the defendants should be given the benefit of the doubt. What more when the documents were filed on January 22.

What I have said thus far is sufficient to dispose of the matter herein. Therefore, I do not propose to deal with the rest of the contentions. The learned Deputy Registrar was right in his decision in setting aside the judgment. The appeal is dismissed with costs to the defendants.

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